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Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA, PETITIONER,

vs.

ISTHMIAN STEAMSHIP COMPANY

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED AUGUST 19, 1958
CERTIORARI GRANTED OCTOBER 13, 1958**

Supreme Court of the United States

OCTOBER TERM, 1958

No. 285

UNITED STATES OF AMERICA, PETITIONER,

vs.

ISTHMIAN STEAMSHIP COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

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Original Print

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[fol. A] IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24415

ISTHMIAN STEAMSHIP COMPANY,
Libelant-Appellee.

v.

UNITED STATES OF AMERICA,
Respondent-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

.

[File endorsement omitted]

[fol. 1] APPENDIX TO APPELLANT'S BRIEF—Filed April
23, 1957

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 185-33

ISTHMIAN STEAMSHIP COMPANY, a Delaware corporation,
owner of the American Steamship "STEEL WORKER"
and other vessels

vs.

THE UNITED STATES OF AMERICA

DOCKET ENTRIES

Basis of Action: Breach of Contract—\$115,203.76.

PROCTORS

For Libelant:

KIRLIN CAMPBELL & KEATING
120 Broadway (5)

For Respondent:

U. S. Atty.
5 & 6

Date

Filings—Proceedings

Mar. 29-55	Filed libel & stip. for costs (\$100. Federal Insurance Co.)
Apr. 5-55	" affidavit of service upon U. S. Atty. and Attorney General.
June 14-55	" stip. for claimants' or respondent's costs (\$100. Federal Insurance Co.)
[fol. 2]	
June 23-55	" answer of U. S. A.
June 24-55	" notice of motion re: to consolidate causes for trial. Ret. 6/28/55. (Also in A185-274).
July 15-55	" exceptions to answer and notice of motion. Ret. 7/26/55.
Aug. 10-55	" Opinion #22093. Dimock, J. Isthmian's exceptions are sustained and its application for a decree granting the relief sought by it in A 185-33 is granted. Gov's. motion for consolidation is denied.
Aug. 9-55	Memo. end. on motion papers filed 7/15/55. See memorandum. Dimock, J.
Sept. 8-55	Filed order denying motion to consolidate this cause and A185-274. Dimock, J.
Sept. 19-55	" Libelant's bill of costs taxed at \$40.00 Clerk.

(B)

Sept. 26-55 Filed unsigned order.

Date	Filings—Proceedings
Sept. 26-55	Filed final decree. Exceptions sustained. Isthmian S. S. Co. recover from the U. S. A. the sum of \$115,203.76. Dimock, J.
Dec. 19-55	" Notice of Appeal.
Nov. 29-56	" Stipulation of omissions from record on appeal to USCCA.
Nov. 30-56	Filed notice of certification of record on appeal to USCCA.

[fol. 3] IN UNITED STATES DISTRICT COURT

LIBEL AND COMPLAINT—filed March 29, 1955

A. 185-33

To the Honorable the Judges of the United States District Court for the Southern District of New York

The libel and complaint of ISTHMIAN STEAMSHIP COMPANY, a Delaware corporation, owner of the American Steamship *Steel Worker* and other vessels,

—against—

THE UNITED STATES OF AMERICA, in a cause of contract, civil and maritime, alleges on information and belief, as follows:

First: Libelant, Isthmian Steamship Company, is and at all times hereinafter mentioned was a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 71 Broadway, New York, N. Y. and at all such times libelant was the owner of the *SS. Steel Worker*. Respondent is the United States of America, a sovereign state.

Second: Jurisdiction of this Court is invoked under the Suits in Admiralty Act, 46 U. S. C. 741 *et seq.*, 41 Stat. 525 *et seq.*

Third: Within the last two years respondent became obligated to libelant for the cost of transportation by

water on the *S.S. Steel Worker* of certain cargo owned or possessed by respondent acting through Military Sea Transportation Service, an agency of respondent, for which respondent agreed to pay libelant freight pursuant [fol. 4] to Government Bill of Lading No. WY-1904360, issued by libelant and accepted by respondent, covering said transportation.

Fourth: In due course libelant submitted to respondent an accomplished bill of lading and public voucher for payment of freight in the amount of \$116,511.44. However, respondent has failed and refused to pay the sum of \$115,203.76 due under said bill of lading to libelant.

Fifth: Libelant has performed all obligations and conditions on its part to be performed under the bill of lading. Payment has been duly demanded by libelant but respondent has in breach of said bill of lading contract refused and still refuses payment.

WHEREFORE, libelant prays judgment against respondent in the amount of \$115,203.76, together with such interest as is allowable thereon for delay in payment and for such other and further relief as to the Court may seem just and proper.

KIRLIN CAMPBELL & KEATING

Proctors for Libelant,

Office & P. O. Address:

120 Broadway,
New York 5, N. Y.

(Verification not printed.)

[fol. 5] IN UNITED STATES DISTRICT COURT

ANSWER—filed June 23, 1955

The respondent, answering the libel herein:

1. Admits the allegations contained in Article designated First thereof.
2. Admits the allegations contained in Article designated Second thereof.
3. Admits the allegations contained in Article designated Third thereof.
4. Denies each and every allegation contained in Article designated Fourth thereof except that respondent admits that libelant submitted to respondent a bill of lading and public voucher for payment of freight in the amount of \$116,511.44.
5. Denies each and every allegation contained in Article designated Fifth thereof except that the respondent admits that payment of the sum of \$115,203.76 has been demanded by libelant and respondent affirmatively alleges that the sum was paid by respondent to libelant.

FOR A SEPARATE AND COMPLETE DEFENSE, RESPONDENT
ALLEGES AS FOLLOWS:

6. Heretofore and on February 7, 1942, pursuant to Executive Order 9054, the President of the United States [fol. 6] established the War Shipping Administration under the direction of an administrator appointed by the President and said administrator assumed certain functions, (5) duties and powers of the United States Maritime Commission theretofore conferred upon the United States Maritime Commission under the Merchant Marine Act, 1936, as amended.
7. On the 1st day of September 1946, the control, functions, duties and powers of the United States Maritime Commission which had theretofore been transferred to the War Shipping Administration were again vested in the United States Maritime Commission until the 24th day of May 1950, when the control, functions, duties and powers of the United States Maritime Commission were transferred to the United States Department of Commerce, Maritime Administration.

8. On June 13, 1946 and as of April 29, 1946 the respondent, acting by and through the Administrator, War Shipping Administration, and libelant entered into an agreement in writing bearing No. WSA 12800, designated Warshipdemiseout Form 203, pursuant to the terms of which the respondent chartered to the libelant the vessels *Cape Elizabeth*, *Oriental*, *Cape Martin*, *Sea Scorpion*, *Sea Cardinal*, *Sea Stallion*, *Sovereign of the Seas* and *Morning Light* on a bareboat basis at the basic charter hire rates therein specified for each calendar month for each of said vessels and, for the terms of said agreement, respondent asks leave to present said agreement upon the trial of this proceeding.

[fol. 7] 9. Said agreement provided in Part I, Clause A, as follows:

"Uniform Terms. This Agreement consists of this Part I, and Part II published in the Federal Register of April 27, 1946, the provisions of said Part II being incorporated by reference as part of this agreement. Unless otherwise in this Part I expressly provided, all of the provisions of said Part II shall be a part of this Agreement as though fully (6) set forth in this Part I. In the event of a conflict between the provisions of Parts I and II, the provisions of Part I shall govern to the extent of such conflict."

10. Clause 13 of Part II of said agreement provided as follows:

"Additional Charter Hire. After redelivery of all Vessels under this Agreement, if the cumulative net voyage profits computed for the period of the agreement (after the payment of the basic charter hire provided herein and payment of the Charterer's fair and reasonable overhead expenses applicable to operation of the Vessels) shall be in excess of a rate of ten (10) per centum per annum on the Charterer's capital necessarily employed in the business of the Vessels during the period of the agreement (all as hereinafter defined in Clause 23) the Charterer shall pay to the Owner at Washington, D. C. within sixty (60) days thereafter, an amount equal to one-half of such cumulative net voyage profit in excess of an

amount computed for the period of the agreement at [fol. 8] the rate of ten (10) per centum per annum on such capital as hire in addition to the hire payable under Clause 12; provided, however, that such payment of additional charter hire shall be deemed to be preliminary and subject to adjustment upon the completion of final audit by the Owner, at which time such payments will be made by or to the Owner as such final audit may show to be due. The Charterer shall, (1) keep its books, records and accounts relating to the management, operation, conduct of the business of and maintenance of the vessels covered by this Agreement in accordance with the 'Uniform System of Accounts for Operating-Differential Subsidy Contractors' prescribed by the United States Maritime Commission in its General Order No. 22 and under such regulations as may be prescribed by the Owner: *provided*, however, that, if the Charterer is subject to the jurisdiction of the Interstate Commerce Commission, the Owner shall not require the duplication of books, records, and accounts, required to be kept in some other form by that Commission; and (2) file, upon notice from the Owner, balance sheets, profit and loss statements, and such other statements of operation, special reports, memoranda of any facts and transactions, which, in the opinion of the Owner, affect the results in, the performance of, or transactions or operations (7) under this Agreement. The Owner is hereby authorized to examine and audit the books, records, and accounts of the Charterer in so far as the same relate to operations under this Agreement whenever it may deem it necessary or desirable so to do."

[fol. 9] 11. Pursuant to the terms and provisions of Clause 13 of Part II of said agreement referred to in Articles Fifth, Sixth and Seventh hereof, the libelant was required to pay to the respondent additional charter hire in the sum of \$115,203.76 for the use of vessels chartered to the libelant during the period May 1, 1946 to and including July 31, 1948.

12. Respondent has duly performed all of the terms, covenants and conditions of the agreement on its part to be performed.

13. On June 3, 1953 the sum of \$115,203.76 claimed by the libelant herein was paid by the respondent by the application and set-off of the sum of \$115,203.76 which was then due and owing by the libelant to the respondent as herein alleged.

WHEREFORE, respondent prays that the libel herein be dismissed with costs.

J. EDWARD LUMBARD

United States Attorney

Proctor for Respondent

Office & P. O. Address

607 U. S. Court House

Foley Square

New York 7, N. Y.

(Verification not printed)

[fol. 10] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,
—against—
UNITED STATES OF AMERICA,
Respondent.

A. 185-274

UNITED STATES OF AMERICA,
Libelant,
—against—
ISTHMIAN STEAMSHIP COMPANY,
Respondent.

NOTICE OF MOTION TO CONSOLIDATE CAUSES FOR TRIAL—
dated June 23, 1955

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Benjamin H. Berman duly sworn to June 23, 1955, the pleadings herein and on all the proceedings heretofore had herein, the undersigned will move this Court at a Stated Term for Motions thereof to be held in the United [fol. 11] States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York on the 28th day of June, 1955 at 10 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, for an order pursuant to Rule 13 of the Admiralty Rules of this Court, consolidating the above-captioned causes for trial

together and for such other and further relief as to the Court may seem just in the premises.

Dated: New York, N. Y.

June 23, 1955.

Yours, etc.

J. EDWARD LUMBARD

United States Attorney

Proctor for United States of America.

607 U. S. Court House

Foley Square.

New York 7, N. Y.

To:

KIRLIN, CAMPBELL & KEATING, Esqs.

Proctors for Isthmian Steamship Company.

120 Broadway

New York 5, N. Y.

[fol. 12] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF BENJAMIN H. BERMAN

State of New York,

County of New York—ss.:

BENJAMIN H. BERMAN, being duly sworn, deposes and says:

I am an attorney in the United States Department of Justice and I am familiar with the proceedings heretofore had in these suits. I make this affidavit in support of the respondent's motion to consolidate the cause in which Isthmian Steamship Company is libellant (Ad. 185-33) with the suit entitled *United States Of America v. Isthmian Steamship Company*, Admiralty Docket No. 185-274, in which the Government sues to recover an amount equal to that claimed by the libellant in the suit bearing Admiralty Docket No. 185-33.

This motion is made pursuant to Admiralty Rule 13 of the rules of this Court which said rule provides as follows:
(10)

"When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried together, and enter a single decree or decrees in each cause."

The suit by Isthmian Steamship Company against the Government was instituted by the libellant on March 29, 1955 to recover the sum of \$115,203.76; freight moneys due to Isthmian Steamship Company from the Department of the Navy, Military Sea Transportation Service. An answer pleading payment has been interposed by the respondent. The answer admits that the Government was [fol. 13] originally indebted to Isthmian Steamship Company for the amount claimed in the libel and affirmatively alleges that the indebtedness was fully paid by the setting off and payment of the amount thereof upon a claim against Isthmian Steamship Company for \$115,203.76 by the Maritime Administration for additional charter hire in connection with the chartering of several vessels by the War Shipping Administration to Isthmian Steamship Company.

The liability of Isthmian Steamship Company for additional charter hire is disputed by it and the claim has therefore been made the subject of a suit instituted in this court by the Government against it (Admiralty Docket No. 185-274). It is this latter suit which the Government seeks to have consolidated with the suit by Isthmian Steamship Company against the Government.

There is the one issue to be litigated in the disposition of both suits. The issue is that raised by the separate defense pleaded in the answer in the suit against the Government wherein it is alleged that the Navy Department, through the Military Sea Transportation Service, was indebted to Isthmian Steamship Company for \$113,203.76 and that the indebtedness was paid by setting off the claim of the Maritime Administration against the libellant for an (11) equal amount. The question common

to both suits is whether Isthmian Steamship Company was indebted to the Government for \$115,203.76 for additional charter hire for vessels chartered to it by the War Shipping Administration. The determination of that question would dispose of both suits.

I respectfully ask that the respondent's motion to consolidate both suits be granted.

BENJAMIN H. BERMAN

(Sworn to June 23, 1955)

[fol 14] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

NOTICE OF HEARING ON EXCEPTION TO ANSWER—dated
July 14, 1955

Sirs:

Please Take Notice that the exceptions of the libelant will be brought on for hearing at a Stated Term for Motions to be held at the United States Court House, Room 506, Foley Square, in the Borough of Manhattan, City of New York, on the 26th day of July, 1955, at 10 o'clock in the forenoon.

Dated: New York, N. Y.
July 14, 1955.

Yours, etc.

KIRLIN, CAMPBELL & KEATING,
Proctors for Isthmian Steamship Company
120 Broadway
New York 5, New York

To:

J. EDWARD LUMBARD, Esq.
United States Attorney
Proctor for United States of America
607 U. S. Court House
Foley Square
New York 7, N. Y.

[fol. 15] IN UNITED STATES DISTRICT COURT

LIBELANT'S EXCEPTION TO ANSWER—Dated July 14, 1955

The libelant excepts to the answer of respondent and asks for judgment on the pleadings on the following grounds:

First: The answer does not constitute a defense to the cause of action set forth in the libel.

Second: The matter set forth in paragraphs 6 through 13 of the answer may not be pleaded as a defense to the cause of action set forth in the libel because it does not arise out of the same contract, cause of action or transaction for which the libel was filed.

Third: Libelant excepts to paragraph 4 wherein respondent "denies each and every allegation in Article designated Fourth" of the libel except as admitted and paragraph 5 wherein respondent "denies each and every allegation contained in Article designated Fifth" of the libel except as admitted. The basis of these denials is that (as alleged in paragraph 13 of the answer), "on June 3, 1953 the sum of \$115,203.76 claimed by the libelant herein was paid by the respondent by the application and set-off of the sum of \$115,203.76 which was then due and owing by the libelant to the respondent." It appears from articles 6 through 11 of the answer that this alleged set-off is a disputed claim by respondent for additional hire said to (14) have accrued between May 1, 1946 and July 31, 1948 under a bareboat charter dated as of April 29, [fol. 16] 1946, whereby eight government-owned vessels were chartered to libelant. Therefore it appears on the face of the answer that the attempted set-off arises out of a different contract which had terminated more than four years before the issuance of the bill of lading and the making of the shipment, out of which libelant's claim for freight in this suit arose. Respondent cannot properly set-off damages arising out of another contract, cause of action or transaction.

Fourth: Respondent admits that it "became obligated to libelant for the cost of transportation by water on the *SS Steel Worker* of certain cargo owned or possessed by respondent * * * for which respondent agreed to pay

libelant freight pursuant to Government Bill of Lading No. WY1904360, issued by libelant and accepted by respondent covering said transportation" and respondent has not pleaded any proper defense in its answer. Therefore libelant is entitled to judgment against respondent on the pleadings.

WHEREFORE, libelant prays that the matter excepted to be stricken from the answer and that libelant be given judgment on the pleadings.

Dated: New York, N. Y.
July 14, 1955.

Yours, etc.

KIRLIN, CAMPBELL & KEATING,
Proctors for libelant
Office & P. O. Address
120 Broadway
New York 5, New York

[fol. 17] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

A. 185-274

UNITED STATES OF AMERICA,
Libelant,

—against—

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

OPINION—August 9, 1955

Dimock, D. J.

Libelant in A. 185-33, Isthmian Steamship Company, excepts to certain articles of the answer and seeks a decree pro confesso. Respondent in the same action, the United States of America, moves, pursuant to Rule 13 of the Admiralty Rules of this court, for an order consolidating the two suits which are captioned above. Herein-[fol. 18] after I will refer to A. 185-33 as "Isthmian suit" and to A. 185-274 as "the government's suit".

Isthmian's suit, commenced by libel filed on March 29, 1955, is brought to recover from the government the sum of \$115,203.76 alleged to be the unpaid balance of freight due Isthmian from the government for Isthmian's carriage of goods owned by a government agency under a government bill of lading on Isthmian's vessel, the *Steel Worker*, within two years before the date on which the libel was filed. The government's answer admits that it "became obligated to" Isthmian for the freight but alleges, in

Articles 5 and 13, that payment of the sum was made on June 3, 1953 by the "application and set-off" of a sum identical with the one here claimed by Isthmian.

The government's suit is brought to recover from Isthmian the sum of \$115,203.76 alleged to be unpaid, due and owing the government as additional hire under a bareboat charter party, dated as of April 29, 1946, for the use by Isthmian of eight identified government-owned vessels during the period from May 1, 1946 to July 31, 1948. The *Steel Worker* was not one of the eight chartered vessels.

The amount claimed by the government as due and owing in its suit against Isthmian is the same bareboat charter hire the alleged set-off of which is set up as the government's defense of payment in Isthmian's suit against the government.

Isthmian excepts to Articles 6 through 13 and to portions of Articles 4 and 5 of the government's answer. Articles 6 through 13 labeled "A Separate and Complete [fol. 19] Defense", contain the same allegations which are the basis of the government's suit and the additional allegation of satisfaction of Isthmian's claim by the government's setoff of the sum which is the subject of the government's suit. The portions of Articles 4 and 5 to which Isthmian excepts deny Isthmian's allegations that the sum for which it is suing has not been paid. The only basis for these denials is the matter set up in the government's separate defense.

Isthmian says that Articles 6 through 13 amount, in substance, to a claim for set-off and argues that since the sum sought to be set-off against its claim arises out of an alleged transaction which is wholly different from the one which is the subject of Isthmian's suit the attempt to set-off is improper. I am clear that if the government's separate defense is a set-off Isthmian's exceptions must be sustained. In admiralty a set-off is not cognizable except in so far as it relates to the transaction which is the subject of the libel. *The Jane Palmer* D. C. S. D. N. Y., 270 F. 609; *United Transp. & L. Co. v. New York & B. Transp. Line*, D. C. S. D. N. Y., 180 F. 902, aff'd 185 F. 386; *The Yankee*, D. C. E. D. N. Y., 37 F. Supp. 512; *Susquehanna S. S. Co. v. A. O. Anderson & Co.*, 4 Cir.,

6 F. 2d 858; *Hildebrand v. Geneva Mill Co.*, D. C. M. D. Ala. S. D., 32 F. 2d 343. Here the transaction upon which Isthmian's suit is based and the one upon which the government's separate defense is based are different in kind and distant in time from one another. The Government, however, argues that its separate defense is one of payment rather than one of set-off. It is quite true that the government alleges that on June 3, 1953, by setting off the claim the facts of which are alleged in its separate defense, it "paid" Isthmian's claim. The trouble with [fol. 20] this is that Isthmian denies the allegation. In fact the government's suit was instituted, pursuant to 31 U. S. C. § 227, to establish its right to this amount. Indeed, the fact of non-payment of this identical claim was expressly asserted by (18) the government in supporting the government's successful motion to dismiss Isthmian's suit in the Court of Claims to recover this balance of freight. *Isthmian Steamship Company v. United States*, 130 F. Supp. 336. The government either paid the freight to Isthmian or it did not. If it paid the freight it did so by cancelling its claim against Isthmian for charter hire. Suit for the charter hire is completely inconsistent with any such cancellation. See *Climactic Rainwear Co. v. United States*, Ct. Cl., 88 F. Supp. 415.

The effect of what has been said is that Isthmian's exceptions must be sustained. In turn, the effect of this determination is that the government's motion for consolidation must be denied. Rule 13 of the Admiralty Rules of this court provides:

"When various suits are pending, all resting upon the same matter of right or defense, although there be no common interest between the parties, the court may consolidate or compel said suits to be tried together, and enter a single decree or decrees in each cause."

While the government's separate defense to Isthmian's suit was part of its answer it could at least have been argued that the identity of the government's defense in one suit with its claim in the other might justify consolidation. The sustention of Isthmian's exceptions has eliminated even this argument.

[fol. 21]. In opposition to the branch of Isthmian's motion which seeks a decree pro confesso, or, as Isthmian says in its moving papers, "judgment on the pleadings", the government says only that it knows of no authority in admiralty for the grant of "judgment on the pleadings". It does not deny Isthmian's repeated assertions that "Respondent (the Government) admits that libellant (Isthmian) is entitled to the freight except for the alleged 'payment' by set-off". Nor has the government even requested that, in the event that Isthmian's exceptions are sustained, it be given leave to answer further.

The government is correct in its assertion that in admiralty there is no authority for judgment on the pleadings, but I do not believe that justice will be served by holding Isthmian rigidly to its misnomer. Under General Admiralty Rules 27 and 29 the matter of exception may be taken pro confesso against the government to the full purport and effect of the articles of the libel left unanswered. These articles embody Isthmian's whole claim. The government concedes that the answer (19) admits that the government was originally indebted to Isthmian for the amount claimed.

Isthmian's exceptions are sustained and its application for a decree granting the relief sought by it in A. 185-33 is granted. The government's motion for consolidation is denied.

Dated: August 9, 1955

E. J. DIMOCK
United States District Judge

[fol. 22] IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,

—against—

UNITED STATES OF AMERICA,
Respondent.

A. 185-274

UNITED STATES OF AMERICA,
Libelant,

—against—

ISTHMIAN STEAMSHIP COMPANY,
Respondent.

ORDER DENYING MOTION TO CONSOLIDATE—Dated August
31, 1955

The United States of America, having moved for an order, pursuant to Rule 13 of the Admiralty Rules of this Court, consolidating the above captioned causes for trial, and the Court having filed its opinion, dated August 9, 1955, it is

ORDERED, that said motion be and is hereby denied.

Dated, New York, N. Y.,
August 31, 1955.

E. J. DIMOCK
U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

FINAL DECREE—Dated September 22, 1955.

A libel having been filed herein on March 29, 1955 pursuant to the Suits in Admiralty Act, 46 U. S. C. 741 et seq. 41 Stat. 525 et seq., for the sum of \$115,203.76 with such interest as may be allowable thereon, and the libelant having excepted to the answer of the respondent, and having prayed that the matter excepted to be stricken from the answer, and that libelant be given judgment on the pleadings, and the Court having filed its opinion, dated August 9, 1955, it is

ORDERED that the said exceptions be and are hereby sustained, and that a decree in favor of the libelant against the respondent as prayed for in the libel be and is hereby granted, and it is

ORDERED, ADJUDGED AND DECREED that Isthmian Steamship Company, libelant, recover of and from the United States of America, respondent, the sum of \$115,203.76, with interest at four percent (4%) per annum from March 29, 1955, amounting to the sum of \$2,070.51, together with costs in the sum of \$40.00, as taxed, amounting in all to the sum of \$117,314.27, with interest at four percent (4%) per annum on the said total sum of \$117,314.27, from the date of this decree until paid.

Dated, New York, N. Y.,
September 22, 1955.

s/ E. J. DIMOCK
U. S. D. J.

[fol. 24] UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

—
A. 185-33

ISTHMIAN STEAMSHIP COMPANY,
Libelant,
—against—
UNITED STATES OF AMERICA,
Respondent.

—
NOTICE OF APPEAL—Dated December 19, 1955

Sirs:

PLEASE TAKE NOTICE that the respondent hereby appeals to the United States Court of Appeals for the Second Circuit from the final decree dated September 22, 1955 and entered herein on September 26, 1955 in favor of the libelant and against the respondent for the sum of [fol. 25] \$117,314.27, and respondent appeals from the whole and each and every part of said decree.

Dated: New York, N. Y.
December 19, 1955

Yours, etc.,

PAUL W. WILLIAMS
United States Attorney
Proctor for Respondent
Office & P. O. Address
607 U. S. Court House
Foley Square
New York 7, N. Y.

To:

KIBLIN, CAMPBELL & KEATING, Esqs.
Proctors for Libelant
120 Broadway
New York, N. Y.

[fol. 26] IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 4—October Term, 1957.

Argued November 6, 1957

Docket No. 24415

ISTHMIAN STEAMSHIP COMPANY,

Libelant-Appellee,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellant.

Before:

SWAN, MEDINA and WATERMAN,

Circuit Judges.

Appeal from a decree of the United States District Court for the Southern District of New York, in admiralty. Edward J. Dimock, *Judge*. Opinion below not reported. Affirmed.

KIRLIN, CAMPBELL & KEATING, New York, N. Y.
(Clement C. Rinehart and Walter P. Hickey,
New York, N. Y., of Counsel), *for libelant-
appellee.*

[fol. 27] GEORGE COCHRAN DOUB, Assistant Attorney General, Washington, D. C., Paul W. Williams, United States Attorney, Southern District of New York, New York, N. Y., Paul A. Sweeney, Washington, D. C., Benjamin H. Berman, New York, N. Y., and Herman Marcuse, Washington, D. C., Attorneys, Department of Justice (Leavenworth Colby, Chief, Admiralty & Shipping Section, Department of Justice, Washington, D. C., of Counsel), *for respondent-appellant.*

OPINION—Decided May 6, 1958

MEDINA, Circuit Judge:

This appeal involves the same questions as were considered in *Grace Line, Inc. v. United States*, our opinion in which case is filed herewith. In 1946 Isthmian Steamship Company, appellee, used eight vessels chartered to it on a bareboat basis by the United States through the War Shipping Administration. As a result of Isthmian's use of these vessels for the period from May 1, 1946 to July 31, 1948, the United States claimed \$115,203.76 as additional charter hire, which Isthmian refused to pay. When, after carrying certain cargo for the United States in 1953, Isthmian submitted a bill for \$116,511.44, the United States withheld the amount allegedly due as additional charter hire. Isthmian thereupon filed the libel below to recover its freight for the 1953 shipments.

Isthmian's libel did not refer to its alleged indebtedness to the United States arising out of the 1946-1948 chartering of the vessels. The government's answer alleged that Isthmian was indebted to the United States because of the earlier transaction between the parties, but Isthmian's exception to this answer was sustained on the ground that the admiralty court had no jurisdiction [fol. 28] over the set-off not related to the subject of the libel, and a decree *pro confesso* followed.

For the reasons stated in our opinion in *Grace Line, Inc. v. United States*, the decree of the court below is

Affirmed.

WATERMAN, Circuit Judge (concurring):

I concur in the result. See my separate concurring opinion in *Grace Line, Inc. v. United States*.

Involved in this case is an added issue relative to the jurisdiction of the court below because of a possible time bar period. Lest it be thought that this issue was not considered by us, I would add that the pleadings disclose that the district court and this court have jurisdiction.

[fol. 29] IN UNITED STATES COURT OF APPEALS.

FOR THE
SECOND CIRCUIT

Present:

HON. THOMAS W. SWAN
HON. HAROLD R. MEDINA
HON. STERRY R. WATERMAN
Circuit Judges.

ISTHMIAN STEAMSHIP COMPANY,
Libelant-Appellee

v.

UNITED STATES OF AMERICA,
Respondent-Appellant

Appeal from the United States District Court for the
Southern District of New York.

JUDGMENT—May 6, 1958

This cause came on to be heard on the transcript of
record from the United States District Court for the
Southern District of New York, and was argued by coun-
sel.

ON CONSIDERATION WHEREOF, it is now hereby
ordered, adjudged, and decreed that the decree of said
District Court be and it hereby is affirmed; with costs to
the appellee.

A. DANIEL FUSARO
Clerk

[fol. 30] . . .

[fol. 31] [Clerk's Certificate to foregoing transcript omit-
ted in printing]

[fol. 32] SUPREME COURT OF THE UNITED STATES

(Title omitted)

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including

August 19, 1958

JOHN M. HARLAN
*Associate Justice of the Supreme
Court of the United States.*

Dated this 30th day of July, 1958.

[fol. 33] . . .

[fol. 34] SUPREME COURT OF THE UNITED STATES

No. 285—October Term, 1958

UNITED STATES OF AMERICA,
Petitioner,

vs.

ISTHMIAN STEAMSHIP COMPANY,

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.